STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 28, 2001
v	No. 224026 Kent Circuit Court
JACK THOMAS CRAWFORD, JR., Defendant-Appellant.	LC No. 99-001044-FC

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant was convicted by jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(l)(a) and MCL 750.520b(l)(b), and sentenced to life in prison, as a fourth felony offender, MCL 769.12. Defendant appeals as of right. We affirm.

On appeal, defendant first argues that when the trial court permitted the prosecutor to present evidence that defendant failed to take a polygraph, he was denied a fair trial. Further, defendant argues, the trial court's attempt to balance the unsolicited comment by defendant's wife suggesting defendant may have taken a "lie detector test" resulted in unnecessary, unfair, and substantial prejudice to defendant. We disagree.

The admission or exclusion of evidence rests in the sound discretion of the trial court, and the trial court's exercise of discretion will not be overturned on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). A trial court's decision to grant or deny a mistrial is also reviewed for an abuse of discretion. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000); *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999).

Typically, it is error to permit reference to a polygraph during a criminal trial. *Nash*, *supra* at 97; *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). Error occurs even though the results of a polygraph test are not actually admitted, but only implied. *People v Frechette*, 380 Mich 64, 72; 155 NW2d 830 (1968); *People v Smith*, 211 Mich App 233, 234-235; 535 NW2d 248 (1995). However, admission of evidence regarding a polygraph test does

not always warrant reversal. *Nash*, *supra* at 98. This Court has developed a number of factors to assist making a determination whether reversal is required, as noted in *Nash*, *supra* at 98:

> Previously, to determine if reversal is required, this Court has analyzed a number of factors, including
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> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982), quoting *Rocha*, *supra* at 9.]

The above factors are not mandatory, nor are they exhaustive, but are rather an analytical tool this Court has used to review whether error requiring reversal has occurred based on the facts and circumstances of the case being reviewed. *Ortiz-Kehoe*, *supra*. The facts of each individual case are critical in determining whether error warranting reversal has occurred. In *Ortiz-Kehoe*, the prosecution's main and only eyewitness to a grisly murder, who was charged as an accessory after the fact, testified he had to take and pass a polygraph, or he would have been charged with second degree murder. *Id.* at 511. The trial court denied defendant's motion for mistrial and instead gave an "exhaustive curative instruction." *Id*. This Court, after reviewing the above factors, found that the trial court did not abuse its discretion denying the defendant's motion for mistrial. *Id*. at 514. This Court found the reference to the polygraph was inadvertent and an isolated incident, with any prejudice being cured by the trial court's instruction. *Id*. at 515.

In contrast, in *Nash*, *supra*, this Court found that reference by the prosecutor's key witness to taking a polygraph was plain error that seriously affected the fairness of the trial requiring reversal. *Id*. at 101. Similar to *Ortiz-Kehoe*, in *Nash*, the witness involved was a self-professed accomplice to murder and described by this Court as "the only prosecution witness to directly implicate defendant in the homicide." *Id*. at 94. The witness was also described as having many behavioral problems and having a history of spending years in a psychiatric institution. *Id*. at 95. Furthermore, the witness' credibility was severely attacked with conflicting statements. *Id*. The reference to having taken a polygraph was made after the prosecutor repeatedly asked the witness why the jury should believe her. *Id*. This Court concluded that all of the above factors indicated error warranting reversal had occurred. *Id*. at 101. Most important was the fact that the witness' response was not inadvertent, but rather invited by the prosecutor and was used to bolster the witness' credibility. *Id*. at 99. This Court opined, *id*. at 101:

> Thus, each of these factors weighs in favor of defendant. On the basis of this analysis, we believe that a sufficient possibility existed that the jury may have resolved the credibility issue by reference to the polygraph testimony. *People v Yatooma*, 85 Mich App 236, 241; 271 NW2d 184 (1978). Where the reference to the polygraph test was brought out by the prosecutor, not as a matter of defense strategy, and where the key prosecution witness, who was involved in the crime and was the crucial witness against defendant, gave a responsive answer to the prosecutor's question that was posed with the intent of bolstering the witness'

> credibility and was later repeated before the jury during deliberations, we believe that prejudice to defendant occurred.

The present case is unusual because the reference to defendant possibly taking a polygraph test was injected into the trial when defense counsel pressed the witness about her knowledge of an earlier investigation of the victim's allegations of oral sex. Because no criminal charges were brought against defendant as a result of those allegations, the trial court correctly reasoned that as the record existed at that point, the jury might logically infer that defendant had taken and passed a polygraph test. Because such an inference was false, the trial court further reasoned that the reference to defendant possibly taking a polygraph was unfairly prejudicial to the prosecutor and that both the defendant and the prosecutor have a right to a fair trial. The trial court stated:

> While the rule about improper prejudice is usually thought of in terms of the defense, the other side's got a right to a fair and accurate presentation of the evidence too, and when the impression left by the defense is readily countered by some other evidence, I think it necessary that the other evidence be presented.

Moreover, the actual circumstances of defendant not taking the polygraph test were neutral. The testimony showed not that defendant refused to take a polygraph, but that he agreed to take one and arrived early. Only when confusion over the time of defendant's appointment led to an argument with the polygraph operator did defendant decide to exercise his right and not take the test. The jury could have inferred the reason for not taking the test was simply a question of poor timing or the result of a personality clash with the operator. These would be neutral inferences, which were reinforced by the instructions given by the trial court that "taking or not taking [the polygraph] in and of itself proves absolutely nothing." Furthermore, because a polygraph test was not taken, the trial court instructed the jury, "there couldn't have been any results, and therefore nothing for you to concern yourself about in that regard." Therefore, although unusual, the trial court dealt with potentially prejudicial evidence (to the prosecutor), and through a combination of other evidence and limiting instruction, neutralized it so as not to be unfairly prejudicial to either side. This Court cannot say that there was no justification or excuse for the trial court's decision, thus an abuse of discretion did not occur. See *Snider*, *supra* at 419.

Furthermore, even if the trial court erred by permitting the polygraph evidence, defendant exaggerates the potential prejudice. Several inferences could have been made by the jury explaining why defendant did not take the polygraph, as noted above, other than having something to hide. Also, the jury was specifically instructed that defendant had a right to take or not to take a polygraph, and failure to take the polygraph proved nothing. Because defendant chose not to testify, his credibility was not subject to attack for failing to take a polygraph and his silence could not be used against him. Defendant's theory of the case stressed that with all that was known in 1996 there was not enough evidence to bring charges, let alone prove guilt beyond a reasonable doubt, which the assistant prosecutor who reviewed the case admitted. Defendant, of course, wanted the jury to believe he was capable of lying, and did lie when he admitted sexually abusing the victim in recorded telephone calls to his wife. The jury obviously believed

defendant was not lying when he admitted some abuse, but claimed lack of memory on other abuse and apologized because the victim's memory was better than his.

Thus, this case is unlike *Nash*, *supra*, where polygraph evidence was intentionally used to bolster the crucial prosecution witness. Rather, this case is closer to *Ortiz-Kehoe*, which was not a one-on-one credibility contest. Here, the victim's testimony was supported by the testimony of her mother and by defendant's own tape-recorded admissions. Furthermore, even if the trial court erred by admitting the evidence, the error does not merit reversal because, after an examination of the entire cause, it does not affirmatively appear more probable than not that the error was outcome determinative. See *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000), quoting *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

For the same reason, the trial court did not abuse its discretion by denying defendant's motion for mistrial. See *Ortiz-Kehoe*, *supra*. Finally, unpreserved alleged error in the cautionary instruction given by the trial court was not plain error requiring reversal. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 548-549; 520 NW2d 123 (1994). Further, even if the trial court's instruction was plain error, defendant fails to meet his burden of showing the error was outcome determinative or resulted in the conviction of an innocent man or that the fairness, integrity, or public reputation of judicial proceedings were affected. See *Carines*, *supra* at 763.

Defendant next argues that his wife was acting as a police agent and coerced his statements by her threat to leave him and cease visitation. Therefore, defendant argues, his recorded statements were involuntary and their use against him violated his right to due process and his right to protection from compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Const 1963, art 1, § 17. Alternatively, defendant argues that he was denied effective assistance of counsel.

Whether the defendant's statements were knowing, intelligent, and voluntary is a question of law that the court must determine under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *Snider*, *supra* at 416. This requires de novo review of the record, but factual determinations of the trial court will not be set aside unless clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000), quoting *Cheatham*, *supra* at 30. A factual finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000). Thus, to the extent the issue involves interpretation of the law, or application of the constitutional standard to uncontested facts, appellate review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

While defendant was entitled to an explicit pretrial ruling on whether his statements were voluntary, *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2 87 (1965); *Manning*, *supra* at 624-625, his tape-recorded statements were properly admitted because they were not the product of police coercion or inducement. See *Colorado v Connelly*, 479 US 157; 107 S Ct 515; 93 L Ed 2d 473 (1986); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Furthermore, considering the totality of circumstances, defendant's will was not overborne and his capacity for self-determination not critically impaired, therefore his statements were voluntary

and admissible. See *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988); *People v Seymour*, 188 Mich App 480, 484; 470 NW2d 428 (1991).

Coercive police activity is a necessary predicate to finding that a confession is not voluntary under the Fourteenth Amendment due process clause. *Connelly, supra* at 167; *Fike, supra* at 182. The same standard applies to the Fifth Amendment privilege against self-incrimination. *Daoud, supra* at 631, 635; *Cheatham, supra* at 10. The wording of Const 1963, art 1, § 17 is identical to the Fifth Amendment and there is no indication it provides greater protection when considering whether a statement is voluntary. *Id*. at 631 n 9.

In the present case, it is undisputed that when defendant's wife told the police that defendant made admissions to her, the police asked her to record her conversations with defendant and provided her a telephone and recording device. The trial court correctly determined that she was thus acting as a police agent in recording defendant's statements. However, it is also undisputed that the police did not coach her on what to say to defendant. For a statement to be involuntary, there must be a causal connection between coercive police conduct and the confession. See *Connelly, supra* at 164.

Moreover, the undisputed testimony of defendant's wife was that she issued her "threat" to "leave" defendant before contacting the police in 1998. At that time, defendant had been in jail for some time and was facing a lengthy prison sentence. Furthermore, the undisputed testimony of defendant's wife was that both her intention to leave defendant and her expressed love for him were genuine. Also, she testified that it was defendant's admission to her of abusing her daughter that prompted her to go to the police. None of the relational interaction between defendant and his wife was the product of exploitation by the police. See *Id*. at 165; *Fike, supra* at 182. Here, the only thing the police did was provide defendant's wife with the means to record telephone calls initiated by defendant to her home.

Defendant relies on *Lynumn v Illinois*, 372 US 528; 83 S Ct 917; 9 L Ed 2d 922 (1963), and *People v Richter*, 54 Mich App 598; 221 NW2d 429 (1974), for the proposition that "the use of domestic relationships can be a powerful coercive tool." Both *Lynumn* and *Richter* are factually distinguished from the case at bar because they involved direct threats by the police to initiate state action to remove children from mothers. In the present case, no threat directly emanated from the police to initiate state action against loved ones. Here, at most, there was a threat by a private person to take personal action terminating a relationship that already had substantial impediments.

The constitutional right to be free from compelled self-incrimination does not include protection from non-governmental psychological pressures to speak. In *Connelly, supra* at 170, after noting that the sole concern of the Fifth Amendment is governmental coercion, the Supreme Court, quoting *Oregon v Elstad*, 470 US 298, 305; 105 S Ct 1285, 1291; 84 L Ed 2d 222 (1985), further added,

> Indeed, the Fifth Amendment privilege is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion."

Likewise in *Illinois v Perkins*, 496 US 292; 110 S Ct 2394; 110 L Ed 2d 243 (1990), the Supreme Court held *Miranda* warnings were not required when an undercover police agent was placed in jail with an inmate to gather evidence on a crime unrelated to the suspect's current incarceration. The Court found that the inherent danger of coercion from custody and official interrogation was absent in this situation. The *Perkins* Court went on to note that "mere strategic deception by taking advantage of a suspect's misplaced trust" is not the type of coercion *Miranda* forbids. *Id*. at 296. Furthermore, the Court in *Perkins* explicitly held that the use by police of undercover deception does not rise to the level of constitutionally prohibited coercion, writing, *id*. at 297:

> Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns.
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> * * *
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> The tactic employed here to elicit a voluntary confession from a suspect does not violate the Self-Incrimination Clause.

This Court has also held that private pressures to speak do not implicate coercion necessary to render a confession involuntary. In *Seymour*, *supra*, the defendant confessed after the police allowed his girlfriend (Ziemkowski), by whom he had a child, to visit him. The girlfriend threatened to put their child up for adoption if defendant did not confess. This Court upheld the trial court's factual determination that the police did not use the girlfriend, "directly or indirectly, to 'get at' defendant" and that defendant gave his statement "of his own choosing and did so voluntarily." *Id*. at 483. In light of an earlier decision, *People v Switzer*, 135 Mich App 779; 355 NW2d 670 (1984), where this Court held that private coercion (a brutal beating) should have resulted in suppression of the defendant's statement, the panel in *Seymour*, *supra*, went on to address the claim that the girlfriend's threat to put their child up for adoption nonetheless rendered defendant's statement involuntary. This Court opined, *id*. at 484:

> With respect to whether defendant's statement was nonetheless involuntary because it was made only after Ziemkowski threatened to give their child up for adoption, we acknowledge the *Switzer* decision, but find it factually distinguishable and not controlling here. In *Switzer*, the defendant confessed to a crime only after being threatened with his life and beaten by a relative of the victim. In the case at bar, however, while Ziemkowski appealed to defendant's emotions, we cannot say that she coerced him and that his statement was involuntary. When Ziemkowski told defendant she would put their child up for adoption, she fully intended to do so. *Were we to find coercion and involuntariness under the circumstances, any time a family member or friend implores a prisoner to tell the truth, or a defendant claims this is what occurred, the resulting confession would perforce be deemed involuntary.* We do not believe the *Switzer* panel intended its decision to have such far-reaching application or implications. Each case must be reviewed on its own facts and we find, on the basis of the testimony given at the *Walker* hearing in this case, that defendant's statement was not coerced and was not involuntary and that the trial court properly denied defendant's motion. [Emphasis added.]

Thus, the type of familial pressures defendant alleges rendered his statements involuntary are simply not the type of coercion prohibited by the state or federal Constitution. Furthermore, de novo review of the totality of circumstances compels the conclusion that defendant chose to speak in the unfettered exercise of his own will and his statements were therefore voluntary. The record demonstrates that defendant is an intelligent man, as illustrated by the number of challenges he raised to the admission of his tape-recorded statements and his cogent opening statement. Defendant's intelligence was recognized by the trial judge, who permitted defendant to act as his own attorney. Defendant's incarceration meant that he had no real power or authority over Mrs. Crawford, or she over him. This custodial barrier meant that for defendant to communicate with Mrs. Crawford, he had to initiate a collect telephone call and Mrs. Crawford had to accept the call. Similarly, for a personal visit, Mrs. Crawford had to initiate contact and defendant had to accept. In addition, each time defendant placed a collect telephone call from the jail, he was warned it may be monitored or recorded. Defendant acknowledged that had the jail taped his telephone call, he could have accepted it.

The above factors all indicate defendant's statements were voluntary. Furthermore, defendant's own tape-recorded statements undercut his claim that he only made false admissions of abusing the victim to appease his wife. The tape reflects that, without prompting, defendant apologized repeatedly to the victim. When pressed to acknowledge more abuse than oral sex, defendant, rather than acknowledge or deny additional abuse, professed lack of memory. Defendant also indicated he was aware that his admissions may be repeated when he asked at one point, "[n]ow Paula, this is, I hope all this is just for our, just to clear it up for us and our family."

On review of the totality of circumstances, this Court concludes that defendant's statements were voluntary and the product of his own free will and therefore properly admitted at trial. See *Fike*, *supra*; *Seymour*, *supra*. Further, because defendant's statements were voluntary and properly admitted at trial, the effective assistance of counsel issue is moot and without merit.

Defendant next argues that the trial court denied him a fair trial by granting the prosecutor great latitude when questioning witnesses and on the other hand holding defense counsel on a short leash. Defendant's argument is without merit. The trial court did not abuse its discretion in admitting or excluding the evidence that defendant claims to be error. See *Starr*, *supra* at 494. The trial court afforded defendant the opportunity to present a defense, and accorded defendant's due process right to a fair trial. See *People v Stanaway*, 446 Mich 643, 662-664; 521 NW2d 557 (1994); *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). "We require a fair trial, not a perfect trial." *Id*., quoting *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). Furthermore, even if the trial court erred by admitting or excluding evidence, reversal is not required because, after an examination of the entire cause, it does not affirmatively appear more probable than not that any such error was outcome determinative. See *Smith*, *supra*, at 680, quoting *Lukity*, *supra* at 495.

Last, defendant argues that the cumulative effect of trial errors taken together deprived him of due process of law. In order to reverse on grounds of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Defendant's argument of cumulative error fails because no errors have been identified. See *People v Rice (On*

Remand), 235 Mich App 429, 447-448; 597 NW2d 843 (1999). See also *Knapp*, *supra*, where cumulative error did not deny the defendant a fair trial because the evidence of the defendant's guilt was substantial, including, as in this case, the complainant's unequivocal testimony, defendant's apology for his conduct on tape, and other witnesses who supported the complainant's version of events.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter